

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION  
AMERICAN ALLIANCE FOR EQUAL RIGHTS,  
Plaintiff,  
Vs. CASE NO.: 2:24cv104-RAH  
KAY IVEY,  
Defendant  
\* \* \* \* \*  
MOTION HEARING  
\* \* \* \* \*  
BEFORE THE HONORABLE R. AUSTIN HUFFAKER, JR., UNITED STATES  
DISTRICT JUDGE, at Montgomery, Alabama, on Monday, March 18,  
2024, commencing at 9:00 a.m.  
APPEARANCES  
(All appearances via telephone)  
FOR THE PLAINTIFF: Mr. Joshua P. Thompson  
Attorney at Law  
PACIFIC LEGAL FOUNDATION  
555 Capitol Mall, Suite 1290  
Sacramento, California  
FOR THE DEFENDANT: Mr. Benjamin M. Seiss  
Mr. Brenton M. Smith  
Mr. James W. Davis  
OFFICE OF THE ATTORNEY GENERAL  
OF ALABAMA  
501 Washington Avenue  
Montgomery, Alabama  
Proceedings reported stenographically;  
transcript produced by computer

1 (The following proceedings were heard before the Honorable  
2 R. Austin Huffaker, Jr., United States District Judge, at  
3 Montgomery, Alabama, on Monday, March 18, 2024, commencing  
4 at 9:00 a.m.):

5 THE COURT: This is Judge Huffaker.

6 THE COURTROOM DEPUTY: Good morning, Your Honor. For  
7 the plaintiff I have Mr. Thompson, and for the defendant I have  
8 Mr. Seiss, Mr. Smith, and Mr. Davis.

9 And before we begin, I need to read a statement,  
10 please, because we have Ms. Getachew on the line.

11 Members of the public and the media who access this or  
12 any hearing remotely are reminded that you are prohibited from  
13 recording or broadcasting court proceedings. I direct you to  
14 the Court's general orders and local rules, specifically local  
15 rule 83.4, found on our website, for specific information  
16 regarding the prohibition against recording or broadcasting  
17 court proceedings and the penalties for doing so. In short, you  
18 may not record or broadcast this proceeding.

19 You're ready to go, Judge.

20 THE COURT: Good morning. So I've got Mr. Thompson for  
21 American Alliance, and then I've got three attorneys for the  
22 governor. Who's going to be the primary spokesperson?

23 MR. SEISS: Your Honor, this is Ben Seiss. I will be  
24 the primary spokesperson.

25 THE COURT: All right. I've gone back and read

1 everything that's been submitted. That includes plaintiff's  
2 response from yesterday and the governor's filings on Thursday.

3 All right, Mr. Thompson. This is your motion. I've  
4 got -- we've got the motion for a TRO/preliminary injunction.  
5 I've also got the governor's motion to strike Member A. I want  
6 to talk about that a little bit more in detail, and I'll  
7 probably have some questions for you-all as we go through this.

8 Mr. Thompson, you've got the floor.

9 MR. THOMPSON: Thank you, Your Honor.

10 I haven't prepared much for an opening statement. I  
11 think the briefing that we have filed explains the reasons why  
12 we thought a temporary restraining order here was initially  
13 required. After the governor agreed to consolidate that with a  
14 preliminary injunction, we think that is the easiest course to  
15 ensure that the status quo is preserved so that our client's  
16 meritorious -- which I think everybody agrees at this point that  
17 it is at least on the legal claim meritorious -- legal claim can  
18 be heard by this Court.

19 We think the governor's actions as we saw them  
20 initially, when we learned of her decision to appoint members to  
21 the Real Estate Appraisers Board after the lawsuit was filed in  
22 two separate batches, was suspicious, and her submission to this  
23 Court I think only confirmed our suspicions. Because of that  
24 and because of the arguments that we anticipate her making and  
25 that she has made in her papers, that her unilateral actions

1 have mooted or have denied the injury to our client, we think it  
2 is in this Court's power and in the -- and for justice's sake to  
3 enjoin or mandatorily enjoin the governor from going through  
4 those nominations or appointments by ordering her to withdraw  
5 them.

6 We recognize the extreme nature of that remedy, but  
7 that is a result of the governor's actions in this case.  
8 Because of that, we think the TRO should go forward or the PI.  
9 If the Court is ready to rule on summary judgment, because we  
10 think we have clearly established standing here, we think that  
11 is appropriate as well, we put in our papers, and the Court  
12 has authority to do that under Federal Rule of Civil Procedure  
13 65(a)(2).

14 With that, that's all of our papers. I welcome the  
15 Court's questions.

16 THE COURT: Okay. All right. Do you intend to submit  
17 any other materials, evidence, or argument on the pending  
18 motions? And not other than what we're talking about here, but  
19 in writing.

20 MR. THOMPSON: Not at this time, I do not anticipate  
21 submitting any further evidence, Your Honor.

22 THE COURT: All right. I certainly understand that you  
23 are challenging the clause or sentence in the statute and in the  
24 regulation that states that no less than two of the nine board  
25 members shall be a minority race. What about the other sentence

1 that the overall membership of the board shall be inclusive and  
2 reflect the racial diversity of the state? Are you challenging  
3 that?

4 MR. THOMPSON: Yes, Your Honor. We are challenging  
5 that. I think that is fairly encompassed within the complaint  
6 as it was pled. As we replied to the governor's argument in our  
7 reply filed yesterday, we think binding Eleventh Circuit  
8 precedent requires the Court to also enjoin that language  
9 because it necessarily, if it has any force whatsoever, puts the  
10 thumb on the scale in favor of racial discrimination.

11 THE COURT: And then of the nine seats -- I know we  
12 talked about some of this last week, but of the nine seats, you  
13 want me to enjoin the nomination of all of the nominees or just  
14 the public at large or of just the three nominees who happen to  
15 be of a minority status?

16 MR. THOMPSON: Your Honor, I think there are multiple  
17 ways the Court could preserve the status quo. I think the most  
18 straightforward way is to enjoin the governor from making the  
19 appointments that she did after this was filed. That was the  
20 action that necessitated this motion.

21 If the Court is uncomfortable with enjoining all nine  
22 appointments, I think the Court could maintain the status quo  
23 sufficiently by just enjoining the four that were not -- that  
24 were new nominations; in other words, not holdovers. I think  
25 the Court could rule that. It could also enjoin the three that

1 satisfied the racial quota. So either of those I think would  
2 maintain the status quo and would defeat the governor's attempt  
3 to moot this case.

4 THE COURT: Now, you're inferring this, that the  
5 governor's actions are an effort to moot the case, and I want to  
6 make sure I'm clear in understanding your position.

7 Member A has applied for the public at large position;  
8 is that correct?

9 MR. THOMPSON: Yes, Your Honor.

10 THE COURT: And at least I'm inferring from your  
11 argument that because Mr. Mills, who is being appointed or who  
12 has been nominated to that position -- because Mr. Mills is a  
13 minority, he's Black, that his appointment was because of the  
14 racial quota and not because he may have been more qualified  
15 than everybody else that applied for the position?

16 MR. THOMPSON: Your Honor, I have nothing to say about  
17 Mr. Mills in particular. I think the injury in an equal  
18 protection context is the inability to compete on a level  
19 playing field. What we are alleging is that the governor has  
20 followed the commands of the statute in her appointments, and  
21 therefore our client was not allowed to compete on a level  
22 playing field. Whether in fact Mr. Mills is more qualified, he  
23 very well may be, but what is undoubtedly true is that the  
24 governor undertook these actions pursuant to the statute that  
25 forces her to consider race when she made these appointments in

1 two separate batches in an effort to prevent our client from  
2 having her day in court.

3 THE COURT: Now, when you say your client, you're  
4 talking about Member A; is that correct?

5 MR. THOMPSON: I misspoke. Our client is the Alliance.  
6 Member A is a member of the Alliance. I do not represent Member  
7 A, but she is a member of my client's organization.

8 THE COURT: Okay. So why should I infer that the  
9 appointment of Mr. Mills was because of the racial quota rather  
10 than strictly the qualifications of the applicants?

11 MR. THOMPSON: I don't think you should make that  
12 inference, Your Honor. I think what you should do is you should  
13 return this case to the status quo when the complaint was filed  
14 before the government undertook these appointments and allow our  
15 client -- or allow our client's member to compete on a level  
16 playing field.

17 If after that the governor appoints Mr. Mills, that is  
18 perfectly legitimate. Mr. Mills may very well be the most  
19 qualified person for this job, but he did get an advantage  
20 because of his race. The statute requires the governor to put a  
21 thumb on the scale on the basis of race in more than one way.

22 THE COURT: What evidence do you have that the governor  
23 actually applied the racial quota and did not -- compared to  
24 totally ignoring it because of a belief that the quota was  
25 unconstitutional?

1 MR. THOMPSON: We have no evidence of that, Your Honor.  
2 We do think that the governor is required to follow the law, and  
3 she has certainly made no disavowing of following the law. It  
4 is a requirement in Alabama that she do that. And as a  
5 prospective matter, which our claim in the complaint seeks  
6 prospective relief, it's hard to see how a law that mandates the  
7 governor consider race does not influence the governor's  
8 decision making in her nomination.

9 THE COURT: You have taken a position in the filings  
10 that Member A is otherwise qualified for the position but for  
11 her race. When did she submit her application?

12 MR. THOMPSON: I believe -- and I don't have this  
13 information in front of me right now. I believe it was the  
14 Friday before the lawsuit was filed. I think the lawsuit was  
15 filed on a Monday or Tuesday. Again, Mr. Roper would know this  
16 better, but it was shortly before we filed the lawsuit.

17 THE COURT: And why had she not submitted it earlier?

18 MR. THOMPSON: I don't know that she was interested in  
19 the position. We -- well, a couple of things, I think. At one  
20 point she had contacted us, and we were considering filing on  
21 her behalf. And when she expressed concerns about being a  
22 public face, we decided to reach out to the Alliance.

23 Obviously, none of this is in the record, Your Honor.  
24 I'm just giving you my understanding of the facts.

25 The Alliance -- she supported the Alliance's mission,



1 joined the Alliance, and after that applied for the position,  
2 and we brought suit shortly thereafter.

3 THE COURT: And what is her talent in particular? I've  
4 got Mr. Mills' application package. The governor filed it, so  
5 I've got his CV and a questionnaire which I assume is something  
6 the governor requires nominees for any position or applicants  
7 for any nominated position to complete. So what is Member A's  
8 talent and expertise that she would bring to this board?

9 MR. THOMPSON: Your Honor, this is a consumer. This is  
10 a statewide consumer position. I think she brings a belief in  
11 holding government accountable to the people in a strict  
12 adherence to norms of the statute; to constitutional norms. I  
13 don't know -- I don't know more than that.

14 I think it is, as I said before, quite possible that  
15 Mr. Mills would be the governor's choice, but that's not the  
16 injury in an equal protection context. Whether or not she's the  
17 most qualified is of no moment, frankly. It's whether or not  
18 she had the opportunity to compete fairly because of her race,  
19 and that is unquestionably not the case here because the statute  
20 requires the governor to consider race. So whether or not she's  
21 the worst qualified person in Alabama does not matter so long as  
22 she meets the requirements under the statute and her race is not  
23 a factor. Here her race was a factor, and that's what the Court  
24 needs to enjoin. As everybody agrees, that statute is  
25 unconstitutional.

1 THE COURT: Well, I'm just looking at the application  
2 that Mr. Mills submitted, and I assume Member A submitted a  
3 similar application. What's her occupation?

4 MR. THOMPSON: Right now -- Your Honor, I think by  
5 giving that occupation, it would identify her. I'm happy to  
6 submit that. She holds a unique position in Alabama that I  
7 don't think anybody else in the state holds, so I -- it is a  
8 temporary position. I think she does plan to become a  
9 full-time, stay-at-home mom in the future. That role would  
10 allow her to sit on the real estate appraiser's board as a  
11 function of what she is capable of doing.

12 THE COURT: Is she a registered lobbyist?

13 MR. THOMPSON: No. I don't think -- I speak out of  
14 turn. I don't know exactly if she is or not. That's not what  
15 her occupation is.

16 THE COURT: Her spouse, what is the occupation of her  
17 spouse?

18 MR. THOMPSON: Not a hundred percent on that, Your  
19 Honor. I think he's a lawyer, but I don't want to -- I don't  
20 want to say for certain.

21 THE COURT: Okay. Is he a registered lobbyist?

22 MR. THOMPSON: No.

23 THE COURT: Has Member A applied for any other  
24 appointments during the governor's administration?

25 MR. THOMPSON: Not to my knowledge, Your Honor.

1 THE COURT: Has Member A ever been a registered  
2 lobbyist in the state of Alabama?

3 MR. THOMPSON: Not to my knowledge, Your Honor.

4 THE COURT: Is there anything in Member A's social  
5 media or public record that would embarrass the office of the  
6 governor if Member A was to be appointed?

7 MR. THOMPSON: Not to my knowledge, Your Honor.

8 I get the point of Your Honor's questions is to ask me  
9 whether she is qualified for this role. If it would help the  
10 Court, I can submit a subsequent declaration from her going  
11 through the qualifications and indicating --

12 THE COURT: Well, we're here today on your TRO. We  
13 don't have time to wait for her or you to get things together  
14 for her. You're asking me to enjoin a nomination by the  
15 governor under very expedited circumstances because of a concern  
16 that Mr. Mills and these other individuals will come out of  
17 committee Wednesday and potentially be confirmed on Wednesday.

18 So I've got a few more on here. In the last five  
19 years, has Member A or is she presently involved in any agency  
20 proceeding or civil litigation, including proceedings regarding  
21 a professional license or certification?

22 MR. THOMPSON: Not to my knowledge, Your Honor.

23 THE COURT: Has Member A ever been a party or involved  
24 in any civil or criminal legal proceedings?

25 MR. THOMPSON: Not to my knowledge, Your Honor.

1 THE COURT: Has Member A ever been the subject of a  
2 complaint of discrimination on the basis of sex, race, religion,  
3 national origin, age, or disability filed in court or with an  
4 administrative agency?

5 MR. THOMPSON: No. Not to my knowledge, Your Honor.

6 THE COURT: Does Member A have any expertise in real  
7 estate or real estate appraisals?

8 MR. THOMPSON: No. Not to my knowledge, Your Honor,  
9 and the public member is not supposed to have that  
10 qualification.

11 THE COURT: They're not to have -- they can't have any  
12 experience in the real estate industry? I understand they  
13 cannot serve as a real estate appraiser, but what about in the  
14 real estate industry?

15 MR. THOMPSON: That's a question better directed to  
16 Governor's counsel.

17 THE COURT: Is Member A a member of the National  
18 Association of Realtors or the Alabama Association of Realtors  
19 or the Alabama Association of Realtors RPAC --

20 MR. THOMPSON: Not to my knowledge --

21 THE COURT: -- or any leadership class of the Alabama  
22 Association of Realtors?

23 MR. THOMPSON: Not to my knowledge, Your Honor.

24 THE COURT: And so let's just assume that I was to  
25 enjoin the nomination of that public at large seat. What's the

1 next step?

2 MR. THOMPSON: The next step, Your Honor, would be to  
3 move to an expedited hearing on the merits. I think that the  
4 Court can and ought to do so, given that there are such little  
5 factual disputes here.

6 If the governor needs some discovery into our client's  
7 standing, of course, we are going to object pretty vehemently to  
8 the anonymity as the Eleventh Circuit allows that sort of  
9 posture in these types of cases. But that could be possible.  
10 But I don't see that there's any dispute of fact here, and I  
11 would urge the Court to move swiftly to ultimate resolution of  
12 this case so that the governor can fulfill her functions to  
13 nominate the full Real Estate Appraisers Board.

14 THE COURT: Looking at Member A's declaration, there's  
15 a pretty broad statement that says she fears the possibility of  
16 reprisal. Explain to me that concern. Because she's applying  
17 for a position, a public facing position. She has submitted an  
18 application to the governor. I think it would be subject to an  
19 open records request if somebody was to send it. So what's the  
20 fear here, and why does she need to remain anonymous?

21 MR. THOMPSON: Sure, Your Honor. The fear is not  
22 serving on the commission. She would -- she is -- would like to  
23 do that and, of course, that is a public facing role. The fear  
24 is bringing a civil rights lawsuit where she is calling out the  
25 governor of Alabama for her racial discrimination.

1           As the declaration Mr. Bloom submitted detailed Abigail  
2 Fisher's quest to challenge racially discriminatory admissions  
3 at the University of Texas, and she was subject to certain, you  
4 know, very negative -- both in social media and in public, in  
5 the newspapers, et cetera, our client's fear is that challenging  
6 the governor in a statute that requires the governor to  
7 discriminate will subject her to reprisals from maybe not the  
8 governor, but the public. And certainly being a public facing  
9 name in a statute challenging racial discrimination in Alabama  
10 is something that people ought to take seriously. And she takes  
11 her privacy seriously. And in this role, she wants to challenge  
12 the constitutionality of the statute, but she doesn't believe  
13 that she needs to make her name known in order to do that  
14 successfully. And I think the case law on that point is quite  
15 clear.

16           THE COURT: Let me just throw this out there because  
17 the time line -- as much as the concern that you raise about the  
18 time line with respect to the governor's appointment has some  
19 inferences, there would be a similar concern about the time line  
20 of Member A seeking the appointment of this position a day or so  
21 before the lawsuit was filed. Does she really have a true, bona  
22 fide intent to obtain a seat, or is she just a tester?

23           MR. THOMPSON: Your Honor, she has applied for a seat  
24 on this commission. She is prepared and willing, and her  
25 declaration says she wants to serve in that spot.

1           Certainly she does believe in the mission of the  
2 Alliance. The Alliance is an organization established to  
3 challenge racial classifications both at the federal level and  
4 the state level, and that marriage of interests in this position  
5 and objection to the unconstitutional discrimination made this a  
6 proper civil rights lawsuit, but I don't think that discounts  
7 her true declaration as it was submitted to this Court.

8           THE COURT: Mr. Seiss, I'm going to turn to you next.  
9 I'll have some questions for you as well. What is your  
10 response?

11           MR. SEISS: Thank you, Your Honor. I think there's a  
12 lot to say on the reply brief that plaintiffs submitted  
13 yesterday, but I'll be short in my opening.

14           We agree on the merits, but we think there are very  
15 real jurisdictional concerns that we are obligated to raise and  
16 that cannot be waived. The governor is not trying to preserve  
17 some ability to racially discriminate. If the Court is  
18 concerned about the time line or gamesmanship, we have a  
19 response. We're well aware that this question will eventually  
20 become ripe in the colloquial sense for judicial review, likely  
21 from a suit by this plaintiff, and that we will lose that  
22 lawsuit on the merits eventually, but this isn't that time.

23           And I'm happy to answer any specific questions that the  
24 Court has.

25           THE COURT: I know you have taken the position that

1 standing may not exist, but let's just assume that I was to let  
2 the -- I was to deny the TRO, preliminary injunction, let the  
3 nomination go forward. The Senate may not act on it. They've  
4 sat on these nominations before, and I assume they've sat on  
5 nominations for other boards and agencies before. Would there  
6 still be a live case or controversy if Mr. Mills is confirmed?

7 MR. SEISS: Your Honor, so we haven't argued mootness,  
8 and with the amount of time I've had to prepare, I want to say  
9 that this is kind of my off-the-cuff thoughts. I think in terms  
10 of just general mootness, that if he is confirmed, the kind of  
11 injury that we're talking about here, that would definitely be  
12 moot.

13 Now, we're not saying that an exception might not  
14 apply. We haven't fully looked into that. Off the cuff, I  
15 think probably it would be capable of repetition yet evading  
16 review, but, again, we have not fully looked at that issue.

17 THE COURT: Are you really arguing -- the nomination  
18 currently as postured, and that's with the governor having made  
19 her decision to nominate, all of the nominations are still  
20 pending confirmation. When we get down to it, wouldn't you at  
21 least agree there is standing by the plaintiff to pursue the  
22 claims at present?

23 MR. SEISS: No, Your Honor. I would not agree that the  
24 plaintiff has standing to pursue the claims at present.

25 THE COURT: All right. Well, let's just assume, then,



1 that the governor had not made any of these nominations; that  
2 the status of the board was in the position as it existed  
3 February 1. Would the plaintiff have standing at that point?

4 MR. SEISS: Your Honor, for prospective injury, the  
5 plaintiff has to show a real and immediate threat of future  
6 injury. I think under the facts as you presented them, I'm not  
7 sure that the plaintiff could do so. I don't think the  
8 plaintiff has satisfied that burden now as to future prospective  
9 relief, so, no, I don't think so.

10 THE COURT: So when would the plaintiff be able to make  
11 the showing of a real and immediate threat of injury? When is  
12 that window or when does that occasion arise?

13 MR. SEISS: Your Honor, I think if there -- I think if  
14 there was evidence that the appointments were being made to the  
15 positions and -- I think probably, given the 2023 appointments,  
16 that that evidence would be sufficient.

17 THE COURT: The governor could pull this nomination at  
18 any time; is that correct?

19 MR. SEISS: Your Honor, we haven't had the opportunity  
20 to fully dig down into that. I think there's some Alabama  
21 Supreme Court authority that suggests otherwise, but we're not  
22 sure whether it's on all fours. I think implicitly in the power  
23 to appoint, there's a power to withdraw, but, again, we have not  
24 fully researched that issue.

25 THE COURT: And let's just assume Mr. Mills and these

1 others get confirmed Wednesday. These are for three-year terms;  
2 is that correct?

3 MR. SEISS: Not exactly, Your Honor. I believe  
4 Mr. Mills' term would expire -- I want to say it's March 26th of  
5 2026. The dates are not uniform for reasons I don't fully  
6 appreciate.

7 THE COURT: They're staggered is what it sounds like.  
8 He could resign at any time, I would assume? He doesn't have to  
9 fill out his term; correct?

10 MR. SEISS: That's correct. I think so, Your Honor. I  
11 don't have the language right in front of me. I represent the  
12 podiatry board, and in our statute it says the member shall  
13 serve the term. But I don't think that anyone would force  
14 Mr. Mills to continue the term if he so desired to leave.

15 THE COURT: And the governor would have the ability to  
16 remove him from office?

17 MR. SEISS: Your Honor, I think the statute provides  
18 for a for-cause removal option, but I'm not certain of that.

19 THE COURT: All right. Well, let's just assume  
20 hypothetically that he's confirmed, this case proceeds on, and  
21 that at some point it becomes apparent that Mr. Mills was  
22 appointed because of the quota obligations. Can the governor  
23 remove him?

24 MR. SEISS: I'm not sure, Your Honor. I tend -- I  
25 don't think that would meet the kind of traditional for-cause

1 removal. I think the language refers to, like, not doing his  
2 job; not showing up for meetings. The concern that Your Honor  
3 is expressing sounds like something more suitable for like a quo  
4 warranto action.

5 THE COURT: What is your position on behalf of the  
6 governor as to -- I know -- let me back up. According to your  
7 brief, you recognize that the quota language is  
8 unconstitutional. Outside of that, has there been any court  
9 decision or Attorney General's opinion that has made that same  
10 declaration or taken that same position before the filing of  
11 this brief?

12 MR. SEISS: Your Honor, as to this specific racial  
13 quota, no, I don't believe there are any court opinions and  
14 there are no AG opinions that I'm aware of.

15 THE COURT: For purposes of these nominations, was the  
16 language, the quota language, actually honored by the governor,  
17 or was it ignored as unconstitutional?

18 MR. SEISS: Your Honor, in the limited time that we've  
19 had this motion, we have not been able to have a sit-down  
20 conversation with the governor or her appointments director to  
21 truly know the answer to that question. I will say in the  
22 conversations that we've had with the governor's legal counsel,  
23 we have received no indication that she was intentionally  
24 enforcing the quota. I think the only evidence in this case as  
25 to the quota is just that the quota was satisfied. In

1 plaintiff's reply brief, they used the language "followed the  
2 quota," and I think that would not even stand up on 12(b)(6)  
3 review. I think Twombly says you have to have more -- your  
4 allegations have to be more than it being consistent with the  
5 quota, and there's no evidence beyond that in this case.

6 THE COURT: Okay. I'm just thinking down the road if  
7 this case was to get into discovery. Would the governor ever be  
8 forced to explain the basis for any of these nominations? I  
9 would think there's some sort of deliberative or executive  
10 privilege that may exist there, but would the governor ever have  
11 to explain why she appointed person A over person B or any of  
12 these other nominations?

13 MR. SEISS: Your Honor, I haven't researched that, but  
14 I wouldn't think so, and our office would strongly argue against  
15 discovery into that. That's a core discretionary function of  
16 the governor. We're talking about -- that's just quintessential  
17 government, and that deliberative process is not something that  
18 should be disclosed in our view.

19 THE COURT: Have you seen the application submitted by  
20 Member A?

21 MR. SEISS: Your Honor, we have no way to know. We  
22 have seen what purport to be all the applications received for  
23 the public member position since 2023, and we can hazard a guess  
24 as to which of those is Member A based on the identifying  
25 features that we have, but we do not know for sure that who

1 plaintiff claims Member A to be submitted an application.

2 THE COURT: Well, and I don't really ask that from the  
3 point of view of who Member A claims to be. I'm asking it from  
4 the point of view of if I compare Member A versus Mr. Mills or  
5 anybody else that applied for the public-at-large position, from  
6 a qualifications standpoint of who would best serve that  
7 position, where does Member A stand?

8 MR. SEISS: Your Honor, I don't personally dispute the  
9 premise of Your Honor's questioning, but I cannot represent what  
10 the appointments director or the governor considered in making  
11 this appointment, so I can't answer that question.

12 THE COURT: As it concerns handling of Member A, is  
13 your position that I should either just ignore the declaration  
14 or should I strike it or should I require the uncloaking of that  
15 individual's name? What's the governor's position?

16 MR. SEISS: Your Honor, I think the procedural vehicle  
17 we're not particularly concerned about. It should either be  
18 stricken, or it should be entitled to zero weight to satisfy  
19 their preliminary injunction burden. I -- yes. I say that's  
20 our position.

21 THE COURT: All right.

22 MR. SEISS: We'd like an opportunity to confirm who  
23 Member A is, because we think there are valid due process  
24 concerns with our ability to defend this case, to make arguments  
25 that nonracial reasons were considered in the appointment of

1 Mills.

2 THE COURT: Did you not get copied on that email to my  
3 office Friday?

4 MR. SEISS: No, Your Honor. And from the status  
5 conference, I didn't understand us to be getting that  
6 information.

7 THE COURT: Mr. Thompson, what's the concern with  
8 letting the attorneys for the governor know who Member A is?

9 MR. THOMPSON: Your Honor, if we could have a  
10 protective order and we could do that in camera, I don't think  
11 we do have an objection. The concern is that that name becomes  
12 public. And if the governor's counsel is willing to enter a  
13 protective order for that purpose, then I think that would be  
14 appropriate.

15 THE COURT: Okay. And I have no idea how many people  
16 applied for the position, but I think that's a name that's  
17 fairly discoverable on your end, Mr. Seiss, since it's a female  
18 who lives in Prattville.

19 All right, Mr. Seiss. Let's just assume that I believe  
20 that there is standing here, that I think that standing would  
21 continue to exist even if the appointment was to go forward, and  
22 Mr. Mills and all the others were to get confirmed. What's the  
23 next step or posture of this case, given the governor's position  
24 as to the unconstitutionality of the quota?

25 MR. SEISS: Your Honor, we think that we're entitled to

1 discovery into the identity of Member A and to pursue the  
2 potential nonracial reasons that were considered in appointing  
3 Mr. Mills over Member A.

4 THE COURT: All right. Mr. Seiss, anything else you  
5 want to say?

6 MR. SEISS: No, Your Honor.

7 THE COURT: And Mr. Seiss, you've got your thumb more  
8 on the pulse of what's going on over at the State House. Do you  
9 know for sure whether these nominations are going to be taken up  
10 on Wednesday? I can pull the agenda just like anybody else can,  
11 and I can see that there's 15 to 20 nominations on the list, but  
12 do you know whether they're actually going to be taken up?

13 MR. SEISS: No, Your Honor. I have no updated  
14 information on that front.

15 THE COURT: And what about from -- and this is putting  
16 the cart before the horse, but assuming they come out of  
17 committee on Wednesday, do you have any idea whether they would  
18 come before the Senate either Wednesday afternoon or Thursday?

19 MR. SEISS: Your Honor, it's not clear to me that the  
20 nominations have to go through the three-reading process that's  
21 standard for usual legislation, but it appears that's the  
22 process being followed. So I would think the earliest would be  
23 Thursday, but I'm not confident on that.

24 THE COURT: So they've already had a first reading, and  
25 then they could get a second reading Wednesday and third reading

1 Thursday, and that's it?

2 MR. SEISS: That's my understanding, Your Honor.

3 THE COURT: Mr. Thompson, anything else you want to  
4 address or say?

5 MR. THOMPSON: Yes. There are a few points that I  
6 would like to mention in response to the governor's argument  
7 today.

8 I think it was quite telling that the governor said  
9 that even though there were nine -- that there was only one  
10 opening on February 1st, that they would still argue standing.  
11 And the Court asked, when is that window for when standing would  
12 be had and the governor wouldn't dispute it, and I wasn't sure  
13 that there was an answer there. So the fact that the governor  
14 is making suppositions here that when there are no pending  
15 nominations, there still isn't standing, is quite demonstrative  
16 of their argument as to when we could have brought this lawsuit.  
17 We brought this lawsuit when there were no nominations pending.  
18 That ought to have been a clear case of Article III standing.

19 I think there's a little bit of confusion over the  
20 difference between the injury here -- I would reiterate that our  
21 injury as pled in the complaint is that equal consideration on  
22 the basis of race. Whether Member A would be chosen or whether  
23 she would be chosen in the future really doesn't matter to that  
24 equal protection injury. What matters is that she just have an  
25 equal shot at that, and that race not be a factor. That is



1 unequivocal, whether the statute is followed by the governor or  
2 not.

3           The Court has to presume that the governor follows  
4 Alabama law. It's in the statute. It requires the governor to  
5 do it. That must put a thumb on the scale. Otherwise, Alabama  
6 law has no effect.

7           And we would not undertake any discovery into the  
8 reasons for the governor's nomination of any particular  
9 individual for that purpose. Whether person A, B, C, D, or E is  
10 chosen, it doesn't matter. The statute requires the governor to  
11 consider race. That's what we want to have enjoined so that all  
12 Alabamians can compete equally for nominations to the Real  
13 Estate Appraisers Board. So we have no desire or we don't even  
14 think it's relevant why the governor has chosen any particular  
15 individual. What matters is that race not be a factor.

16           And that's all I have, Your Honor.

17           THE COURT: Mr. Seiss, back to you. Address the  
18 statement that we have to presume that the governor followed the  
19 law in February when she made the appointments, and in following  
20 the law, she followed the quota requirements set out in the  
21 statute.

22           MR. SEISS: Your Honor, at this time I'm not entirely  
23 sure what authority Mr. Thompson is relying on. I'm not  
24 disputing that he has some authority. But I think it's -- the  
25 governor has to -- is presumed to comply with the law, but not

1 necessarily that she's directly enforcing the racial quota. I  
2 don't think there's any evidence here that that's what she was  
3 doing intentionally.

4 I think an example to illustrate this point is if there  
5 was only one applicant to the public member position -- and I'm  
6 not saying that's what occurred here -- and that applicant was a  
7 minority, the governor didn't have to directly enforce the quota  
8 requirement or directly consider race to choose that member.  
9 And plaintiffs have not shown whatsoever that that wasn't the  
10 case here as to any of the three positions that minorities were  
11 appointed to.

12 THE COURT: Anything else from either side?

13 Mr. Thompson, anything else from you?

14 MR. THOMPSON: No, Your Honor.

15 THE COURT: Mr. Seiss, anything else from you?

16 MR. SEISS: No, Your Honor.

17 THE COURT: All right. We will start looking at this  
18 and make a ruling as quickly as we can. I will try to get  
19 something out to you by Wednesday -- on or by Wednesday, not  
20 guaranteeing it -- but if something new happens in the interim,  
21 please call it to my attention.

22 I will work on a protective order. Mr. Thompson, I  
23 assume an attorneys' eyes only and governor's office eyes only  
24 order is satisfactory to you?

25 MR. THOMPSON: Yes, Your Honor.

1 MR. SEISS: Your Honor, if I may.

2 On the protective order issue, I think we believe that  
3 Member A's name should have to be disclosed, not like in  
4 general. There's a high showing that plaintiff has to make to  
5 show that they're entitled to proceed anonymously or  
6 pseudonymously. That's the Chiquita Brands case out of the  
7 Eleventh Circuit. And they haven't done that. They have one  
8 general statement about a possibility of fear of reprisal. That  
9 doesn't carry that burden, Your Honor.

10 THE COURT: And I understand that. I was really asking  
11 this from the point of view of, well, do you want the name now,  
12 or do you want to wait? And if you want it now, I was going to  
13 create a mechanism for you to get it.

14 MR. SEISS: That's fine, Your Honor. Thank you.

15 THE COURT: All right. Anything else, Mr. Seiss?

16 MR. SEISS: No, Your Honor.

17 THE COURT: I appreciate it. We will let you know  
18 accordingly. Thank you very much.

19 (Proceedings concluded at 9:41 a.m.)

20 \* \* \* \* \*

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript  
from the record of the proceedings in the above-entitled matter.

This 22nd day of March, 2024.

/s/ Patricia G. Starkie  
Registered Diplomat Reporter  
Certified Realtime Reporter  
Official Court Reporter